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STATE OF WASHINGTON

NO. \_\_\_\_\_

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 37079-4-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

INTERNET COMMUNITY & ENTERTAINMENT CORP., d/b/a  
BETCHA.COM,

Respondent,

v.

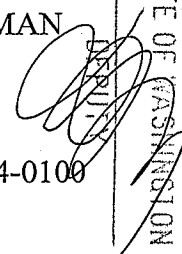
THE STATE OF WASHINGTON and the WASHINGTON STATE  
GAMBLING COMMISSION,

Petitioners.

**PETITION FOR REVIEW**

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COURT OF APPEALS  
DIVISION II  
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## **I. INTRODUCTION**

This matter arises under the Uniform Declaratory Judgments Act, Chapter 7.24, RCW and presents the following question: Can the operator of an internet gambling website successfully evade Washington's constitutional and statutory bans on such gambling by reminding internet gamblers who utilize the website that they are legally able to "welch"<sup>1</sup> on their wagers with each other? The Thurston County Superior Court answered that question in the negative and was subsequently reversed, in a 2-1 ruling, by the Court of Appeals, Division II. This petition asks the Court to accept review of the Court of Appeals decision.

## **II. IDENTITY OF PETITIONER**

The State of Washington and its Gambling Commission (the "State") ask this Court to accept review of the Court of Appeals decision terminating review designated in Section III of this petition.

## **III. COURT OF APPEALS DECISION**

The State seeks review of the decision of the Court of Appeals, Division II, filed on February 10, 2009, that reversed the trial court decision granting summary judgment in favor of the State and directed

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<sup>1</sup> To "welch" is defined as "1: to cheat by avoiding payment of bets....2: to avoid dishonorably the fulfillment of an obligation." *Webster's Third New International Dictionary* 2596 (2002). While this term may be objectionable to some, it is the term used by Betcha.com and the Court of Appeals and, therefore, is used in this brief.

that summary judgment be granted in favor of Betcha.com. A copy of the Court of Appeals' decision is attached as Appendix A.

#### **IV. ISSUES PRESENTED FOR REVIEW**

1. Whether bettors placing wagers on Betcha.com's internet gambling website engaged in "gambling," as defined in RCW 9.46.0237, and whether Betcha.com engaged in "bookmaking," in violation of RCW 9.46.0213, by accepting bets and charging the bettors a fee or "vigorish."<sup>2</sup>

2. Whether Betcha.com, through its website, promoted and facilitated gambling and, in so doing, transmitted and received gambling information by means of the Internet in violation of RCW 9.46.240.

3. Whether the services Betcha.com offered on its internet gambling website constitute a form of "professional gambling" as defined in RCW 9.46.0269(1)(a), (c) and (d).

4. Whether Betcha.com created, possessed and used "gambling records" in violation of RCW 9.46.217.

#### **V. STATEMENT OF THE CASE**

##### **A. Factual Background.**

##### **1. Creation of the Betcha.com gambling website.**

In June and July of 2007, Internet Community & Entertainment Corp., d/b/a Betcha.com ("Betcha.com"), operated an internet gambling

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<sup>2</sup> A "vigorish" is "a charge taken (as by a bookie or a gambling house) on bets." *Webster's Third New International Dictionary* 2551 (2002).



website out of its offices in Seattle, Washington, and billed itself as the world's first "honor-based betting exchange." CP 176, 330. It did so on the theory that brokering bets between on-line gamblers for a fee does not promote or facilitate "gambling" if the parties to the wager agree that they are able to "welch" on their bet. CP 221, 230, 312-15. Based on the theory that its customer's activities do not constitute "gambling," Betcha.com also claims it is not subject to the other provisions and prohibitions contained in the state Gambling Act (the "Act"), Chapter 9.46 RCW. CP 310-27.

Prior to commencing operation, Betcha.com's founder<sup>3</sup> created a prototype of the website and began raising money. CP 180-81, 183-84, 186-87. In the summer of 2006, Betcha.com leased offices in Seattle and developed a "server farm" to handle the internet gambling transactions. CP 174, 181-83, 810. The servers were intentionally located in Canada to evade United States law enforcement agencies. *Id.*

**2. How Betcha.com conducted, and profited from, its illegal gambling operation.**

**a. Placing a wager on the Betcha.com website.**

To bet on Betcha.com's website, a gambler registers as a user, creates a username, provides a mailing address, and funds a wagering account with a credit card payment made over the Internet. CP 202. The

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<sup>3</sup> Founder Nicholas Jenkins is also the sole member of Betcha.com's board of directors and serves as its CEO, president, vice president, treasurer and secretary. CP 175-76. For all intents and purposes, Jenkins is Betcha.com.

gambler then drafts a bet. This is accomplished with a “tool” that enables the gambler to write out a gambling proposition manually, or to draft a proposition using a series of drop down menus that offer bettors an up-to-date list of various events on which to place a wager. CP 204-05, 340. The “tool” also contains fields for the gambler to enter the amount of the wager, the odds, the point spread, and the minimum “honor rating” that the “accepting” gambler must possess. CP 340, 399-432. The Betcha.com website also offers content that encourages gamblers to create their own wagers and/or promotes other possible bets devised and listed by Betcha.com’s staff. CP 178-79, 217-20, 344-49, 351-52.

When a gambler either lists a wager or accepts a posted bet, Betcha.com places the funds being wagered in escrow. CP 203. If a gambler attempts to place or accept a wager without having sufficient funds in his account, the website directs the gambler to a webpage that facilitates adding additional funds to the account by means of a credit card. CP 207-08.

**b. Betcha.com’s “honor rating system.”**

Under Betcha.com’s “honor rating” system, each gambler is assigned an “honor score.” CP 101-03. Upon funding a wagering account, a gambler automatically receives 250 “honor points.” CP 191. Betcha.com adds or deducts points depending on various factors, including the amount of money wagered, the promptness with which the bettor settles a gambling debt, and

whether the bettor has “welched.” CP 190-91, 194, 196, 434-35. Gamblers may also specify that they will only accept wagers from bettors with a certain minimum “honor rating.” CP 129, 401, 434.

When listing a bet, a gambler also enters a time certain when the outcome of the event being wagered upon will have been determined. CP 209-10. Once that time has passed, a gambler can signal to an opposing gambler a win, a loss, that the outcome of the wager is ambiguous, or a “welch.” CP 211-13, 214. Once a winning claim has been made, the opposing gambler has 72 hours in which to respond. CP 209-10. If the opposing gambler does not respond within 72 hours, Betcha.com will transfer the wagered funds to the claimant’s account. CP 104-05, 213. If a gambler affirmatively admits a loss, payment is immediately made to the winner. CP 213, 422. If a losing gambler opts to “welch,” the bet is not paid and the wager is terminated.<sup>4</sup> CP 422. If the “ambiguous button” is selected, the bet stays in limbo until the dispute is resolved. CP 211-13.

**c. Betcha.com’s collection of fees or “vigorish.”**

Betcha.com makes money by deducting non-refundable fees from a gambler’s account whenever he engages in any of the following activities: (1) listing a bet; (2) accepting a posted bet (also known as a “matching” fee

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<sup>4</sup> While the website was open to the public, there was only a single occurrence of a bettor “welching.” CP 214-15. That happened when an employee of Betcha.com both listed and accepted the same bet and then “welched” on it. CP 215-16, 384, 387.

because it is automatically charged against the accounts of both the listing and accepting bettors whenever a bet is accepted); (3) proposing a counteroffer to a posted bet; and, (4) electing to “up-sell” a posted bet, which increases the visibility of the bet by posting it in a larger font size and in a more prominent location. CP 197-201, 395-97. None of these fees are refundable if a bet is not accepted or if a gambler “welches.” CP 198, 201.

### **3. Betcha.com’s suspension of illegal gambling activities.**

On June 8, 2007, Betcha.com opened to the public. CP 185. Over the next month, Betcha.com accepted wagers from 38 individual gamblers throughout the United States. CP 354-81, 389. Most of the bets made on the site related to sporting events. CP 354-81, 391-93.

On June 21, 2007, special agents from the Gambling Commission met with Betcha.com’s CEO Jenkins. CP 441-45. Jenkins stated that he expected to be visited by them and that Betcha.com’s operations did not constitute gambling because bettors were able to “welch.” CP 443-44. The agents disagreed and asked Jenkins to cease operations. Jenkins refused. *Id.* The agents also mentioned an administrative declaratory judgment process existed that Betcha.com could use to determine the legality of its operations. CP 444. Jenkins responded that he knew, but chose not to do so. *Id.*

On July 6, 2007, Jenkins and his counsel met with Commission staff and were served with a cease and desist letter. CP 444-45. Jenkins refused

to stop operating the website and threatened to file a lawsuit. *Id.* On July 9, 2007, the Commission executed a search warrant on Betcha.com's offices and seized computer equipment and documents. CP 449, 454-55. After service of the warrant, Betcha.com indicated that, for the time being, it would no longer be brokering gambling on its website. CP 6, ¶ 14.

**B. Procedural History.**

On July 10, 2007, Betcha.com served the Commission with a Complaint seeking a ruling, pursuant to the Uniform Declaratory Judgments Act, that Betcha.com's website did not violate the Act. *See* CP 559-60, ¶¶ 20, 21. Subsequently, Betcha.com filed two amended complaints that dropped Jenkins as a plaintiff and added the State as a defendant. *Compare* CP 3-10 and CP 622-60. On October 19, 2007, the State filed its Answer to the Second Amended Complaint. CP 546-51.

In the fall of 2007, the parties exchanged cross-motions for summary judgment. CP 11-38, 458-537. On November 9, 2007, the Superior Court granted summary judgment in favor of the State. RP 3-4; CP 540-42. On December 4, 2007, Betcha.com filed a timely Notice of Appeal and, on February 10, 2009, the Court of Appeals reversed the Superior Court's decision. CP 538-39; App. A-1 through A-17.

**VI. REASONS WHY REVIEW SHOULD BE ACCEPTED**

"The only method of seeking review by the Supreme Court of

decisions of the Court of Appeals is review by permission of the Supreme Court, called 'discretionary review.'" RAP 13.1(a). The criteria for such review are set forth in RAP 13.4(b). The Court of Appeals ruling raises issues regarding the scope of the statutory and constitutional prohibitions against gambling. Further, the Court of Appeals' decision conflicts with settled case law and established constitutional and statutory interpretations and will significantly impair the state's ability to enforce statutes that were promulgated to protect the public from organized crime and other corrupt influences. These are "issue[s] of substantial public interest" that should be determined by the Supreme Court. RAP 13.4(b)(4).

**A. Whether The State Gambling Laws Can Be Evaded Because A Bettor Can "Welch" On A Bet Is A Matter Of Significant Public Interest.**

**1. The evolution of gambling in the State of Washington.**

Unauthorized gambling activities, including internet gambling, have always been illegal in the State of Washington. As initially adopted in 1889, the Washington Constitution, Art. II, § 24, banned *all* gambling by specifically providing that: "The legislature shall never authorize any lottery or grant any divorce." This Court subsequently made clear that the term "lottery," as used in the Constitution, encompasses all forms of gambling. *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 145, 247 P.2d 787 (1952). Moreover, this Court has also made clear that

the prohibition contained in the Constitution was absolute and self-executing. *City of Seattle v. Chin Let*, 19 Wash. 38, 40, 52 P. 324 (1898).

In 1972, the electorate voted to amend Article II, Section 24 of the Constitution.<sup>5</sup> Shortly thereafter, the Legislature enacted the Gambling Act, which permits some specifically limited forms of gambling activities under highly regulated circumstances. The Act's purpose is: (1) to keep the criminal element out of gambling; and, (2) to promote the social welfare by "limiting the nature and scope of gambling activities and by strict regulation and control." RCW 9.46.010. The Legislature specifically stated its policy and intent:

It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling....

RCW 9.46.010. To accomplish these purposes, the Legislature has also provided that "[a]ll factors incident to the activities authorized in [the Gambling Act] shall be closely controlled, and the provisions of this chapter

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<sup>5</sup> As amended, Const. Art. II, § 24, now provides: "The legislature shall never grant any divorce. **Lotteries shall be prohibited except as specifically authorized** upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon." (Emphasis added).

shall be liberally construed to achieve such end.” RCW 9.46.010.

**2. The illegal wagering activities promoted, conducted, and facilitated by Betcha.com constitute “gambling.”**

When the Legislature enacted the Gambling Act and made the decision to decriminalize some limited and highly regulated forms of gambling activities, it did so with the clearly stated intent to limit the nature and scope of gambling in the State. RCW 9.46.010. It did this by statutorily defining “gambling” so that no resort to generalized, non-statutory or foreign jurisdiction source materials is necessary to ascertain the meaning of that term. In pertinent part, RCW 9.46.0237 provides that:

“Gambling,” as used in this chapter, means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, **upon an agreement or understanding** that the person or someone else will receive something of value in the event of a certain outcome.

(Emphasis added). Betcha.com’s solicitation and for-profit brokering of wagers between gamblers falls squarely within this definition.

The Court of Appeals, however, accepted Betcha.com’s argument that betters and bookmakers can avoid this definition if they give lip service to the simple fact that a losing party to a betting agreement might “welch” on the bet. Under the Court of Appeals decision, Betcha.com’s activities are not significantly distinguishable from other illegal gambling activities in Washington State; the loser inevitably has the option to



“welch,” regardless of whether it is mentioned on a website. Indeed, the bettor’s choice not to pay exists as a matter of law because, as Betcha.com concedes, illegal gambling debts are not legally enforceable. RP 19; CP 491. *See Dodd v. Gregory*, 34 Wn. App. 638, 642-43, 663 P.2d 161, *review denied*, 100 Wn.2d 1007 (1983).

The statutory definition does not refer to or depend on the legal enforceability of a bet. Instead, it uses the words “agreement or understanding” in its definition of gambling. *See Cooper v. Baer*, 59 Wn.2d 763, 763-64, 370 P.2d 871 (1962) (contract for gambling debt unenforceable as against public policy). Undoubtedly, the gamblers entering into bets on Betcha.com have an agreement or understanding that the bettor will receive something of value. That is why the gamblers are “rated” based on whether they honor their bets and why the gamblers deposit money to cover those bets.

Betcha.com errs by ignoring the actual definition in RCW 9.46.0237 and, instead, trying to import into it the requirements of an enforceable contract. However, this Court has made clear that “agreement”, in both civil and criminal contexts, is a much broader term than “contract” and the former term does not incorporate or require the formal requisites of the latter. *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 531-32, 424 P.2d 290 (1967) (an agreement “is a manifestation of mutual

assent by two or more persons to one another,” and “has a wider meaning than contract, bargain or promise”) (quoting *Restatement (Second) of Contract*, §§ 1 and 3 and comment a.); *State v. Yancy*, 92 Wn.2d 153, 156-57, 594 P.2d 1342 (1979) (holding that the term “agreement or understanding” in criminal statute prohibiting promotion of prostitution means “informal agreement” and that it is not unconstitutionally vague).

Furthermore, it is absurd to construe RCW 9.46.0237 as requiring that a “gambling” agreement must meet all the formalities of a binding legal contract. Contracts to engage in unauthorized gambling activities are *per se* unenforceable. “[S]tatutes should be construed to effect the legislative purpose and to avoid unlikely, strained or absurd results.” *State v. Landrum*, 66 Wn. App. 791, 797, 832 P.2d 1359 (1992). A court errs by reading language into the statute which the Legislature did not include. *See Vita Foods Products v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). RCW 9.46.0237, by the plain meaning of its terms, as well as by the legislative intent expressed in RCW 9.46.010, is not so limited.

If anything, Betcha.com’s argument confirms that its “customers” were involved in an illegal gambling agreement or understanding. The definition of “welch,” necessarily presupposes that the parties *have* reached an agreement that one party will win something of value. A “welch” is by definition a means of cheating an opponent out of gambling

winnings they otherwise should have received under the terms of the wager, i.e., the terms of the parties' agreement and understanding. As the Superior Court properly noted:

In this particular circumstance, as I understand from all the briefing and arguments that have been presented to me, that the person placing a bet, if they win the bet, expects they're going to collect. The person placing the bet, if they lose, has been told they can welch on that if they choose to do so. But there's nevertheless an agreement and understanding that if a person wins a bet, they're going to be provided something of value. That's the only reason this business can operate. If indeed no one ever paid off on any bet that they lost, this would not be something that would prevail. It is clear to me that there's an agreement or understanding that the person winning a bet will receive something of value, even though there is this little side statement that a person can renege, if they want to.

RP 56, ln.8-25. The Superior Court's rationale is sound and its conclusions are consistent with the Legislature's intent as expressed through the plain meaning of RCW 9.46.0237. Winning a bet on Betcha.com involves an agreement or understanding to receive something of value, regardless of fine print saying that the bettor might renege.

**3. The Court of Appeals reliance on lenity and strict construction to avoid the statutory definition of gambling is erroneous and should be reviewed.**

The Court of Appeals' erroneous decision stems from a failure to properly apply well-settled rules of statutory construction to the statutes at issue in this case. Most fundamentally, the Court of Appeals incorrectly

concluded that because *some* words used in the definitions of “gambling” and “bookmaking” arguably have more than one reasonable meaning, the statutes are necessarily vague and, therefore, the rules of “lenity” and “strict construction” must be applied. Slip Op., App. A-11 - A-14.

The interpretation of a statute involves questions of law that are reviewed *de novo*. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006). The purpose of statutory interpretation is to discern and implement legislative intent. *Id.* at 673. “Where the meaning of statutory language is plain on its face,” courts “must give effect to that plain meaning as an expression of legislative intent.” *Id.* A provision’s plain meaning is discerned from the entire statutory scheme, as well as related statutes and other provisions within the same act that shed light upon the legislature’s intent. *Id.* A second conceivable interpretation of statutory language does not necessarily make the statute ambiguous. *State v. Ose*, 156 Wn.2d 140, 147, 124 P.3d 635 (2005).

In this case, the Court of Appeals approach affects the result. Notwithstanding the fact that the statute’s language is clearly applicable to Betcha.com’s activities, it reached an opposite result. However, no reasonable reading of the statute allows it to be avoided by what is little more than a “wink” acknowledging the possibility of non-payment. Accordingly, the rules of lenity and strict construction are inapplicable.

A natural reading of the statute as set out above shows that the Act unambiguously prohibits the activities engaged in by Betcha.com. The two judge majority did not analyze the statute in the context of the entire Act and did not apply the plain language of the statutory definition. It did not construe the Act as a strictly limited exception to an unambiguous historic prohibition on gambling. It did not consider the detailed recitation of legislative intent in RCW 9.46.010.

**B. Whether Betcha.Com's Activities Violate The Act's Provisions Prohibiting Bookmaking And Professional Gambling Is A Significant Question For This Court.**

The Court of Appeals ruling exempting Betcha.com's gambling activities also affects other definitional and prohibitory sections of the Act. Included among these are the definitions of "professional gambling"<sup>6</sup> and

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<sup>6</sup> "Professional gambling" is defined in RCW 9.46.0269, in pertinent part, as:

1) A person is engaged in "professional gambling" for the purposes of this chapter when:

(a) Acting other than as a player or in the manner authorized by this chapter, the person knowingly engages in conduct which materially aids any form of gambling activity; or

(b) Acting other than in a manner authorized by this chapter, the person pays a fee to participate in a card game, contest of chance, lottery, or other gambling activity; or

(c) Acting other than as a player or in the manner authorized by this chapter, the person knowingly accepts or receives money or other property pursuant to an agreement or understanding with any other person whereby he or she participates or is to participate in the proceeds of gambling activity; or

(d) The person engages in bookmaking; or

....

“bookmaking.”<sup>7</sup> Once again, resort to non-statutory definitional materials is unnecessary and legally inappropriate. *See State v. Postema*, 46 Wn. App. 512, 515-17, 731 P.2d 13, *review denied*, 108 Wn.2d 1014 (1987) (definition of “bookmaking” is not void for vagueness).

A comparison of the terms of those statutory provisions to the above detailed facts indicates that Betcha.com: (1) knowingly engages in conduct that materially aids a form of gambling activity (RCW 9.46.0269(1)(a)); (2) knowingly receives money pursuant to an agreement(s) with others whereby it participates in the proceeds of gambling activities (RCW 9.46.0269(1)(c)); and, (3) engages in “bookmaking” by accepting bets on future contingent events as a business and charges a fee or “vigorous” for accepting the bet (RCW 9.46.0269(1)(d) and RCW 9.46.0213). “Professional gambling,” which includes “bookmaking,” is prohibited under the Act and is a criminal offense. RCW 9.46.220, .221, and .222.

The Court of Appeals initial erroneous conclusion, i.e. that the wagering on Betcha.com is not gambling, was compounded when it led to incorrect rulings regarding bookmaking and professional gambling. As

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<sup>7</sup> RCW 9.46.0213 also specifically defines “bookmaking,” as follows: “Bookmaking,” as used in this chapter, means accepting bets, upon the outcome of future contingent events, as a business or in which the bettor is charged a fee or “vigorous” for the opportunity to place a bet.”

such, the significance of the issue presented is multiplied by its application in these other contexts.

**C. Whether Betcha.com Violated Washington's Prohibition Against Transmitting Or Receiving Gambling Information Is A Significant Question Requiring Review By This Court.**

The Court of Appeals analysis of the definition of "gambling information" in RCW 9.46.0245,<sup>8</sup> and the statutory prohibition against "transmitting or receiving" such information in RCW 9.46.240,<sup>9</sup> is also erroneous. The fact that those two sections do not rely on the definition of "gambling" contained in RCW 9.46.0237 is particularly significant.

RCW 9.46.0245 is a self contained definition that is intentionally independent of the Act's definition of "gambling." That conclusion is reinforced by the statute's mandate that "information" as to wagers, betting odds and changes in betting odds *shall be presumed* to be intended for use in professional gambling. The stand-alone term "information," as used in the statute's second sentence regarding activities that are presumptively regarded as being intended for use in professional

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<sup>8</sup> RCW 9.46.0245 defines "gambling information" as: "Gambling information," as used in this chapter, means any wager made in the course of and any information intended to be used for professional gambling. In the application of this definition, information as to wagers, betting odds and changes in betting odds **shall be presumed to be intended for use in professional gambling....**" (Emphasis added).

<sup>9</sup> RCW 9.46.240 provides that: "Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, the internet, a telecommunications transmission system, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony subject to the penalty set forth in RCW 9A.20.021...."

gambling, has obviously been uncoupled from the word “gambling” by the Legislature and further demonstrates a conscious design not to incorporate the elements of the definition of “gambling” into RCW 9.46.0245.

RCW 9.46.0245 is intended to reach and define activities that do not necessarily contain all three of the elements of gambling found in RCW 9.46.0237 and is also designed to work in conjunction with RCW 9.46.240. The prohibited conduct described by RCW 9.46.240, the knowing transmission or receipt of gambling information, is, as indicated in factual summary above, the very essence of Betcha.com’s business.

**D. Whether Betcha.com’s Use Of Gambling Records In Violation Of RCW 9.46.217 Presents A Significant Issue For Review.**

RCW 9.46.217 prohibits the knowing creation, possession, or use of “gambling records.”<sup>10</sup> As discussed above, Betcha.com has engaged in a variety of illegal gambling activities. The record below contains numerous examples of illegal Betcha.com gambling records associated with those activities that were either obtained during the course of discovery or were seized during the execution of the search warrant. *See e.g.*, CP 354-82, 384-85, 391-93. Based on this unchallenged evidence and the provisions of the Act, Betcha.com created, possessed, and used gambling records in violation of RCW 9.46.217.

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<sup>10</sup> “Gambling records” is defined at RCW 9.46.0253.



**E. The Gambling Issues Raised By This Petition Are Matters of Substantial Public Interest That Should Be Determined By The Supreme Court.**

Washington's Constitution, legislature, and courts have long recognized the social and economic problems that accompany gambling.<sup>11</sup>

In fact, in 2005, the Legislature passed Engrossed Substitute House Bill 1031, Laws of 2005, Ch. 369, specifically to address the funding of problem and pathological gambling treatment in Washington. And the cost of preventing and treating pathological and problem gambling is only one manifestation of the problems caused by uncontrolled gambling:

Problem and pathological gambling affects not only the problem and pathological gambler and his or her family but also broader society. Such costs include unemployment benefits, welfare benefits, physical and mental health problems, theft, embezzlement, bankruptcy, suicide, domestic violence, and child abuse and neglect.

*The Nat'l Gambling Impact Study Comm'n (NGISC)*, Executive Summary, p. 16, June 18, 1999.<sup>12</sup> Internet gambling poses risks not present in the

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<sup>11</sup> See Const. Art. II, § 24 (prohibiting all lotteries, except when approved by a supermajority of the legislature or the electorate); RCW 9.46.010 (recognizing that gambling has a close relationship to organized crime and that close regulation and control of gambling promotes the social welfare); *State ex rel. Schafer v. Spokane*, 109 Wash. 360, 362, 186 Pac. 864 (1920) (gambling is a social and economic evil over which the Legislature has broad powers to prohibit or suppress); *Northwest Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 320, 506 P.2d 878, review denied, 82 Wn.2d 1004 (1973) (same); *State v. Gedarro*, 19 Wn. App. 826, 829-30, 579 P.2d 949, review denied, 90 Wn.2d 1023 (1978) ("Underlying the gambling act, and consonant with the legislative recognition that professional gambling is interrelated with organized crime, are policies which attempt to restrain personal profits realized through professional gambling activities and to discourage participation in such activities").

<sup>12</sup> The National Gambling Impact Study Act, Public Law 104-169 104<sup>th</sup> Congress, created the National Gambling Impact and Policy Commission and directed the

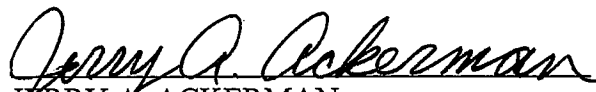
strictly regulated “bricks and mortar” gambling currently authorized in this state. Normal regulatory safeguards are not effective against Internet gambling.<sup>13</sup> Like other forms of unregulated gambling, it also provides fertile ground for criminal activity, including organized crime and terrorism.<sup>14</sup> The Court of Appeals ruling opens the door to gambling in a manner that could have enduring and significant impacts on Washington. Accordingly, the issues in this Petition meet the criteria in RAP 13.4(b)(4).

## VII. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court accept review, reverse the Court of Appeals and affirm the Superior Court’s order granting summary judgment in favor of the State.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of March, 2009.

ROBERT M. MCKENNA  
Attorney General

  
JERRY A. ACKERMAN  
WSBA No. 6535  
Senior Counsel

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Commission to conduct hearings on gambling issues and issue a report of its findings to the President, Congress, State Governors, and Native American Indian tribes.

<sup>13</sup> See Bruce P. Keller, *The Game’s the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 Yale L. J. 1569, 1569-70, 1574-75, 1592 (1999).

<sup>14</sup> See NGISC, Exec. Summary, pp. 21-22, June 18, 1999; See also Jon Mills, *Internet Casinos: A Sure Bet for Money Laundering*, 19 Dick. J. Int’l L. 77 (2000).

# CERTIFICATE OF SERVICE

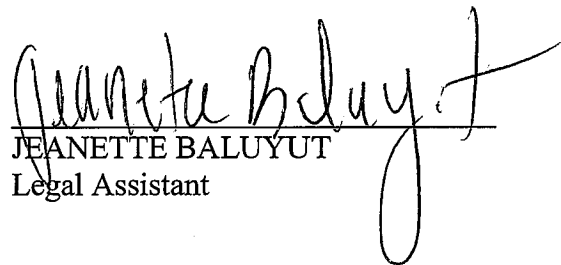
I certify that I caused a true and correct copy of the foregoing  
Petition for Review on all parties or their counsel of record on the date  
below as follows:

LEE ROUSSO  
HADLEY GREEN PLLC  
901 S THIRD STREET  
RENTON, WA 98057-2735

- ☒ Hand delivered by Assistant Attorney General H. Bruce Marvin  
☒ US Mail Postage Prepaid via Consolidated Mail Service

I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 12th day of March, 2009, at Olympia, Washington.

  
JEANETTE BALUYUT  
Legal Assistant

FILED  
COURT OF APPEALS  
DIVISION II  
09 MAR 12 AM 11:47  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

# Appendix A

ATTORNEY GENERAL  
OF WASHINGTON  
FEB 11 2009  
GOVERNMENT COMPLIANCE  
& ENFORCEMENT

FILED  
COURT OF APPEALS  
DIVISION II

FEB 10 AM 9:07  
STATE OF WASHINGTON

BY  DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

INTERNET COMMUNITY &  
ENTERTAINMENT CORP., d/b/a  
BETCHA.COM,

Appellant,

v.

STATE OF WASHINGTON, a government  
entity, and the WASHINGTON STATE  
GAMBLING COMMISSION, a Commission  
of the State of Washington,

Respondents.

No. 37079-4-II

PUBLISHED OPINION

BRIDGEWATER, J. — Internet Community & Entertainment Corp., d/b/a Betcha.com, an Internet betting exchange, appeals from a summary judgment in its declaratory judgment action, ruling that it violated the Washington State Gambling Act, chapter 9.46 RCW, by providing a forum for person-to-person social wagering. We hold that because Betcha.com customers agreed in advance that participants were not required to pay their losses, Betcha.com was not engaged in “gambling” as defined in the Gambling Act. Also, the listing of bets for a fee was not “bookmaking” because bookmaking rests upon Betcha.com engaging in “gambling.” We reverse and remand for entry of summary judgment in favor of Betcha.com.

## FACTS

From June 8, 2007, until on or about July 11, 2007, Betcha.com operated a website that provided a patent-pending, person-to-person betting platform.<sup>1</sup> Internet users who registered and funded accounts on Betcha.com's website could offer betting propositions to other users and accept betting propositions from other users by paying nominal fees to Betcha.com for providing the forum services facilitating that activity.<sup>2</sup> The unique aspect of Betcha.com's business model was that users conducted their activities with the understanding that bettors were not required to pay if they lost a wager. Notably, users had to first agree that bets were "non-binding" in order to use the website. CP at 86. The website's page setting forth "Terms of Service" provided in relevant part:

1. ACCEPTANCE OF TERMS

Welcome to Betcha.com ("Betcha"), the world's first honor-based betting exchange. Betcha provides its service to you, subject to the following Terms of Service ("TOS") . . . .

2. DESCRIPTION OF SERVICE

Betcha provides users with a global platform to list and accept bets (the "Service"). Bets made on Betcha are made on the honor system—that is, bettors are not obliged to pay when they lose. We hope they will, of course, not because they have to, but because they should. In any case, bets made on Betcha carry no term, express or implied, that winning bettors will be paid when they win.

You understand and agree . . . .

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<sup>1</sup> Betcha.com is the creation of its founder and CEO Nicholas Jenkins. Jenkins conceived the honor-based betting model in 2004, and launched the site three years later after he researched its feasibility under Washington law and consulted a gambling law expert.

<sup>2</sup> The website was purportedly "modeled" on eBay with the goal of building a similar "social gathering spot," except that instead of buying and selling items, Betcha.com users could offer and accept betting propositions. See CP at 15, 199.

The Service helps bring bettors together to make non-binding bets. You understand and agree that bets are made between you and fellow bettors, not Betcha. You are responsible for collecting on winning bets. You understand and agree that Betcha assumes no responsibility for bets that are unpaid or underpaid.

CP at 86. The website repeatedly made the point that bets were non-binding. On an informational page under the rubric “Why Betcha > Why Not,” the webpage stated:

At Betcha we treat others as we’d have them treat us. That’s the Golden Rule, and it’s the basis of our unique honor-based betting platform. So we’re duty-bound to be honest about why Betcha might *not* be for you:

**Payments on wins are not guaranteed.**

Betting on Betcha is between individual bettors and groups of bettors. Not us. Bettors always retain the right not to pay their losses. Your protection against that possibility is the Honor Rating system—i.e., you leave negative feedback when/if you run into a welcher, and that feedback makes it that much less likely that other people will do business with your welcher in the future. Betcha does not take a side in bets, one way or the other. And just like when you bet with your pals in the real world, there is no guarantee that losing bettors will pay their losses.

CP at 88. On the “Overview” page the website stated:

**Betcha.com is a person-to-person betting platform. We connect people who like to bet. . . .** For legal reasons, betting on Betcha is done on the honor system—bettors who pay build their reputations (called “Honor Ratings”), bettors who don’t may find it tough to get action in the future.

CP at 89. The FAQ page included the question: “**What if the person I’m betting against doesn’t pay?**” CP at 87. The website answered: “you are basically out of luck,” explaining that although the Betcha.com website would “hold the purse” during the pendency of an active bet by escrowing the bettors’ possible losses, “[n]evertheless, a losing bettor can decide that, for whatever reason, he just doesn’t want to pay.” CP at 87. *See also* CP at 90 (“**Our Mission**” page stressing the website’s “honor-based betting platform”); CP at 92 (website’s answer to FAQ: “**Is**

this legal?," explaining that because bettors can withdraw their bets and not pay their losses, they are not risking anything, thus they are betting without gambling).

To place a bet on Betcha.com's website, a user had to first register, create a username, provide a mailing address, and fund an account with a credit card payment over the Internet. Upon registration, he received an honor rating of 250, which could then go up or down based on his payment record and feedback from other bettors with whom he had bet. He could then bet with other users, individually or in pools, by drafting a bet or using pull down menus provided on the website to assist in formulating the proposition, or he could select from lists of predrafted wagers on a variety of topics. He could also set parameters such as how long the bet was to remain open, and the minimum "Honor Rating[]" that the accepting bettor must possess. CP at 401.

When a bettor listed a bet, the website deducted a small fee from the bettor's account. When another bettor accepted the bet, the website deducted a matching fee from both bettors' accounts. When a user listed or accepted a bet, the funds being wagered were placed in escrow until the bet settled. After the event that was bet upon had occurred, the website sent an e-mail to the bettors telling them to return to the website to make their claim. Bettors then had 72 hours to make a claim. If a bettor did not respond, he agreed to be bound by his opponent's claim. On the claim page, bettors could choose and click on a button indicating: "I won", "I lost," "I can't decide," or "I'm gonna welch." CP at 47, 423. Once a bet had been resolved, each bettor could leave the other feedback, which affected their respective honor ratings.<sup>3</sup>

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<sup>3</sup> Pool betting was similar, but accommodated more people. It also had a finite settlement period and allowed losers to welch by clicking on a button denoting "I refuse to pay." CP at 48.



On June 8, 2007, Betcha.com opened its website to the public and began engaging in the activity described above. On June 21, 2007, agents from the Washington State Gambling Commission visited Betcha.com's Seattle office. The agents met with Jenkins, told him that commission personnel had determined that Betcha.com was engaged in illegal professional gambling and instructed him to stop operations, return all fees that Betcha.com had collected from its customers, and get legal counsel.

On July 6, 2007, Jenkins and his attorney met with commission personnel in Lacey. The commission served Jenkins with a formal cease and desist letter, and Jenkins indicated that he would file a complaint seeking declaratory judgment and injunctive relief.

On July 7, 2007, the commission secured a search warrant for Betcha.com's headquarters based on an affidavit by commission agents establishing probable cause that Betcha.com's operations violated various provisions of the act, chapter 9.46 RCW. The commission executed the search warrant on July 9, 2007, and seized computer equipment and documents used in the online betting operation.<sup>4</sup> Thereafter, Betcha.com notified the commission that it had shut down its website.

On July, 10, 2007, Betcha.com served the commission with a complaint seeking declaratory judgment under chapter 7.24 RCW (Uniform Declaratory Judgments Act) that Betcha.com's website does not violate the act. Betcha.com in part sought a determination that under the act social wagering on its website was not "gambling," and that Betcha.com's

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<sup>4</sup> The commission also began forfeiture proceedings against the seized property under RCW 9.46.231.

facilitation of such wagering for a fee was not “professional gambling” or “bookmaking.” CP at 558-60. The State filed a cross-motion for summary judgment.

The Thurston County Superior Court heard argument on the parties’ respective pending summary judgment motions, and granted summary judgment to the State. The court ruled that as a matter of law, Betcha.com’s Internet gambling operation violates chapter 9.46 RCW as follows: (1) persons placing bets on Betcha.com’s website are engaged in “[g]ambling” as defined in RCW 9.46.0237; (2) Betcha.com’s website promotes and facilitates gambling, and in doing so it transmits and receives gambling information by means of the Internet in violation of RCW 9.46.240; (3) Betcha.com engages in “[b]ookmaking” as that term is defined in RCW 9.46.0213 when it charges a fee to persons placing bets on its website and when it charges a percentage commission on each matched wager on its website; (4) Betcha.com’s activities amount to “professional gambling” as defined in RCW 9.46.0269(1)(a), (c), and (d); and (5) Betcha.com has created, possessed, and used gambling records in violation of RCW 9.46.217. CP at 540-41. Betcha.com filed a timely notice of appeal.

## ANALYSIS

### I. Standard of Review

We review a motion for summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to the nonmoving parties. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary dismissal is proper only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Berrocal*, 155 Wn.2d at 590; CR 56(c). We review questions of statutory interpretation *de novo*. *Berrocal*, 155 Wn.2d at 590.

Where statutory language is plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute. *Berrocal*, 155 Wn.2d at 590. But in undertaking a plain language analysis, we must remain careful to avoid unlikely, absurd or strained results. *Berrocal*, 155 Wn.2d at 590. Moreover, in discerning the plain meaning of a provision, we consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006).

## II. Washington Gambling Act of 1973

The Washington Gambling Act of 1973, chapter 9.46 RCW, prohibits and criminalizes “professional gambling” as defined in the act. See RCW 9.46.0269 (defining professional gambling); RCW 9.46.220 (describing elements of first degree professional gambling and designating that crime as a class B felony); RCW 9.46.221 (describing elements of second degree professional gambling and designating that crime as a class C felony); RCW 9.46.222 (describing elements of third degree professional gambling and designating that crime as a gross misdemeanor). The legislature stated the act’s purpose as follows:

The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.

It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; and at the same time, both to preserve the freedom of the press and to avoid restricting participation by

individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace.

RCW 9.46.010. The act specifically "authorize[s]" fundraising by charitable and nonprofit organizations, as well as bingo, raffles, amusement games, and the operation of punch boards, pull-tabs, card games and other social pastimes when conducted pursuant to the rules of the act.

RCW 9.46.010. The act also exempts fishing derbies, and certain fishing and hunting raffles.

RCW 9.46.010. As to construction of the act's provisions, the noted policy section provides that "[a]ll factors incident to the activities *authorized* in this chapter shall be closely controlled, and the provisions of this chapter shall be liberally construed to achieve such end." RCW 9.46.010 (emphasis added).

### III. Foundational Elements

As noted, Betcha.com sought a declaratory judgment that its website activities did not violate the act, but the trial court determined otherwise ruling that its patrons were gambling, as defined in RCW 9.46.0237; Betcha.com transmitted and received gambling information over the Internet in violation of RCW 9.46.240; engaged in bookmaking as defined in RCW 9.46.0213; engaged in professional gambling as defined in RCW 9.46.0269(1)(a), (c), and (d); and created, possessed, and used gambling records in violation of RCW 9.46.217. Betcha.com assigned error to each of these rulings, but did not discuss RCW 9.46.0269, RCW 9.46.217, and RCW 9.46.240 in its briefing. Instead, it argues generally that because social wagering on its website does not amount to gambling as defined in RCW 9.46.0237, and it did not engage in bookmaking as defined in RCW 9.46.0213, all other asserted statutory violations, which depend upon these definitions, fail. Betcha.com builds its entire case on these two arguments.

At oral argument, the State contended that some of the noted statutory violations relied on other definitions. While that is true, those other definitions, however, also rely on the foundational definitions of either “gambling” or “bookmaking.” For instance, the trial court found that Betcha.com had engaged in “professional gambling” in violation of RCW 9.46.0269(1)(a), (c), and (d). The statute provides in relevant part as follows:

(1) A person is engaged in “professional gambling” for the purposes of this chapter when:

(a) Acting other than as a player or in the manner authorized by this chapter, the person knowingly engages in conduct which materially aids any form of *gambling activity*; or

(c) Acting other than as a player or in the manner authorized by this chapter, the person knowingly accepts or receives money or other property pursuant to an agreement or understanding with any other person whereby he or she participates or is to participate in the proceeds of *gambling activity*; or

(d) The person engages in *bookmaking*; . . . .

RCW 9.46.0269 (emphasis added). As can be seen, “gambling activity” is an essential element of subsections (1)(a) and (1)(c). But “gambling activity” is not separately defined, thus, we must refer to the definition of “gambling” that appears in RCW 9.46.0237. As for subsection (1)(d), because “bookmaking” is an essential element, we must refer to RCW 9.46.0213 for the definition of that term.

RCW 9.46.240 provides in relevant part that “[w]hoever knowingly transmits or receives *gambling information* by . . . the [I]nternet, . . . or knowingly installs or maintains equipment for the transmission or receipt of gambling information shall be guilty of a class C felony.” (Emphasis added.). “Gambling information” is separately defined in RCW 9.46.0245 as “any wager made in the course of and any information intended to be used for *professional gambling*.”

(Emphasis added.). As explained above, “professional gambling” requires either gambling or bookmaking.

RCW 9.46.217 provides in relevant part that “[w]hoever knowingly prints, makes, possesses, stores, or transports any *gambling record*, or buys, sells, offers, or solicits any interest therein, whether through an agent or employee or otherwise, is guilty of a gross misdemeanor.” (Emphasis added.). “Gambling record” is defined in RCW 9.46.0253 to mean “any record, receipt, ticket, certificate, token, slip or notation given, made, used or intended to be used in connection with *professional gambling*.” (Emphasis added.). Again, the required element of “professional gambling” relies in turn on the definitions of either gambling or bookmaking.

As can be seen, all of the statutory violations found by the trial court depend upon the presence of one of the foundational elements of “gambling” or “bookmaking.”

#### IV. Gambling

In relevant part, the act defines “[g]ambling” as “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, upon *an agreement or understanding that the person or someone else will receive something of value* in the event of a certain outcome.” RCW 9.46.0237 (emphasis added).<sup>5</sup> Betcha.com argues that the italicized plain language is not met in this case because there can be no understanding that a bettor *will* receive something of value where the website

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<sup>5</sup> Betcha.com argued in part before the trial court that this definition codified the common law definition of gambling, which requires three elements: consideration, chance, and prize. A public information pamphlet produced by the commission regarding internet gambling demonstrates the commission’s agreement with the notion that these three elements are required. The pamphlet explains simply that “[i]f one of these elements is removed, it is no longer a gambling activity” and such activity would be “okay to play on the Internet.” CP at 40.

stresses that all bets are non-binding. We agree. The salient point here is that as a prerequisite to registration and use of Betcha.com's website, users must acknowledge and *agree* that all bets made on the website are non-binding. Accordingly, bettors cannot have an understanding that they *will* receive something of value if they win.

Betcha.com also contends that the trial court erred when it did not apply the rule of strict construction when addressing RCW 9.46.0237.<sup>6</sup> That statute in conjunction with the other provisions of the act define and prohibit criminal conduct. Statutes that define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process. *State v. Enloe*, 47 Wn. App. 165, 170-71, 734 P.2d 520 (1987). Persons of common intelligence cannot be required to guess at the meaning of the enactment. *Enloe*, 47 Wn. App. at 170-71.

Here, Betcha.com correctly reads the undefined term "will," giving it its common meaning of "shall," and contends that the trial court erred by not doing so. *See State v. Postema*, 46 Wn. App. 512, 515, 731 P.2d 13, *review denied*, 108 Wn.2d 1014 (1987) (a term that is not defined in a statute will be given its ordinary meaning). Citing a dictionary definition, the State responds that "will" can also mean "simple futurity." *See* Br. of Resp't at 20 n.10 (quoting

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<sup>6</sup> Betcha.com now distinguishes between the rule of strict construction and the rule of lenity. It notes that they are corollary rules, the former being designed to operate in the first instance to preclude a broad reading of the language of a criminal statute, and the latter being applied at the end of the inquiry serving as a tiebreaker in the event a court cannot determine the meaning of a criminal statute. *See* Br. of Appellant at 12 n.4 (citing 3 Norman J. Singer, *Statutes and Statutory Construction* § 59.03 (Sands 4th ed. 1986)). *See also State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984) (stating where two possible constructions are permissible, the rule of lenity requires the court to construe the statute strictly against the State in favor of the accused). Before the trial court, however, Betcha.com used the terms interchangeably.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2616-17 (2002)). The State's contention demonstrates that the statute can be read to have two reasonable meanings. Our Supreme Court has articulated the applicable rule in this circumstance as follows: "Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused." *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).<sup>7</sup>

Here, the trial court declined to apply the rule of lenity because the present posture of the case was "civil." RP (Nov. 9, 2007) at 54. But Betcha.com argues forcefully that the nature of the statute at issue determines whether the rule of lenity is to be applied, not the civil posture of the case in which the statute is being considered. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004) (statute with both criminal and non-criminal applications must be interpreted consistently, thus the rule of lenity applies whether the court encounters the statute in a criminal or noncriminal context). *See also Bingham, Ltd. v. United States*, 724 F.2d 921, 924-25 (11th Cir. 1984) (rule of lenity applies when construing criminal statute in a declaratory judgment action—a civil context).

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<sup>7</sup> The appellate courts have repeatedly relied on this formulation of the rule. *See e.g. Staats v. Brown*, 139 Wn.2d 757, 769, 991 P.2d 615 (2000) (quoting *Gore*, 101 Wn.2d 485-86). "The rule of lenity provides that where an ambiguous statute has two possible interpretations, the statute is to be strictly construed in favor of the defendant." *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996) (citing *Gore*, 101 Wn.2d at 486). "[U]nder the rule of lenity, where two possible statutory constructions are permissible, we construe the statute strictly against the State in favor of a criminal defendant." *State v. Bunker*, 144 Wn. App. 407, 420, 183 P.3d 1086 (2008) (quoting *State v. B.E.K.*, 141 Wn. App. 742, 745, 172 P.3d 365 (2007) (citing *Gore*, 101 Wn.2d at 485-86)). "If the language of a criminal rule is susceptible to more than one meaning, the rule of lenity requires that we strictly construe it against the State and in favor of the accused." *State v. Quintero Morelos*, 133 Wn. App. 591, 596, 137 P.3d 114 (2006), *review denied*, 159 Wn.2d 1018 (2007) (citing *Gore*, 101 Wn.2d at 485-86). "Under the rule of lenity, we construe a statute strictly against the State and in favor of the accused when two constructions are permissible."



The State responds that the appropriate rule of construction is found in the act itself, relying on the “liberally construed” language appearing in the last sentence of the legislature’s policy declaration found in RCW 9.46.010. But that statute states in relevant part: “[a]ll factors incident to the activities authorized in this chapter shall be closely controlled, and the provisions of this chapter shall be liberally construed to achieve such end.” RCW 9.46.010. The plain language of this provision clearly provides that liberal construction is to be applied to chapter provisions regarding the regulation of enumerated “activities authorized.” To read the “liberally construed” language as broadly as the State advocates would require us to add language to the statute, which we cannot do. *See Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) (a court will not add words to a statute even if it believes the legislature intended something else but failed to express it adequately).

Thus, the trial court should have applied strict construction and the rule of lenity when interpreting RCW 9.46.0237. There is no logical basis for concluding that bettors have either an agreement or understanding that winners *will* be paid. Accordingly, there is nothing risked, which is the essence of both the common law and statutory definition of “gambling.” *See* RCW 9.46.0237. Thus, neither the users nor Betcha.com engaged in “gambling.”

#### V. Bookmaking

The act separately defines “[b]ookmaking” as “accepting bets, upon the outcome of future contingent events, as a business or in which the bettor is charged a fee or ‘vigorish’ for the opportunity to place a bet.” RCW 9.46.0213. This statute is also ambiguous. “Accepting bets”

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*State v. Esquivel*, 132 Wn. App. 316, 324, 132 P.3d 751 (2006) (citing *Gore*, 101 Wn.2d at 485-86).

can be reasonably read to have two different meanings. One can accept a bet (vis a vis offer and acceptance) as a player or stakeholder who takes a position in the bet. Or, as in Betcha.com's business model, one can accept (meaning "receive") a bet from a bettor for purposes of posting it on the website for another bettor to accept, without having any interest (i.e. without taking a position) in the bet.

Here, Betcha.com listed (i.e. received and posted) bets from registered bettors on its website for other registered bettors to consider. It also charged bettors a fee for listing their bets. This conduct meets the second reasonable reading of the definition of bookmaking as above described, but not the first. Betcha.com contends that because it did not "accept bets" (as a player or stakeholder with an interest in the outcome), it was not "bookmaking" as statutorily defined. Br. of Appellant at 36. Because the statute can be read to have two reasonable meanings, it is ambiguous, and the rule of lenity applies. *See Gore*, 101 Wn.2d at 485-86 (where two possible constructions are permissible, the rule of lenity requires the court to construe the statute strictly against the State in favor of the accused). Applying that rule in Betcha.com's favor, the definition of bookmaking requires one to "accept bets," meaning to take a position in the bet. As noted, Betcha.com did not do so. Accordingly, applying the rule of lenity, Betcha.com did not engage in bookmaking as defined in RCW 9.46.0213.

#### VI. Absence of Foundational Elements is Dispositive

Our determination that the statutory definitions of gambling and bookmaking are not met is dispositive of this case. Because these foundational elements are absent, the trial court erred in ruling that Betcha.com's activities amounted to "professional gambling" as defined in RCW 9.46.0269(1)(a), (c), and (d). The court also erred in ruling that Betcha.com violated RCW

9.46.240, which criminalizes the transmitting and receiving of “gambling information” over the Internet. The court likewise erred in ruling that Betcha.com violated RCW 9.46.217, which criminalizes the making, possessing, or storing of “gambling record[s].”

As discussed above, a required element of “professional gambling” as defined in RCW 9.46.0269(1)(a) and (c) is conduct aiding or facilitating “gambling activity.” Because the act does not define “gambling activity,” we must resort to the definition of “gambling” found in RCW 9.46.0237. Because the activities at issue here do not meet the statutory definition of gambling, there is in turn no “gambling activity” and thus no professional gambling as defined in RCW 9.46.0269(1)(a) and (c). Similarly, because there is no bookmaking, there is no professional gambling as defined in RCW 9.46.0269(1)(d).

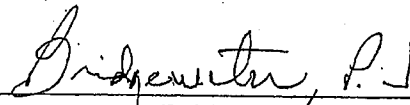
Likewise, the absence of “professional gambling” is determinative of whether Betcha.com violated RCW 9.46.240 and RCW 9.46.217. The former statute in relevant part criminalizes the transmission or receipt of “gambling information” over the Internet. *See* RCW 9.46.240. As noted, “gambling information” is separately defined in RCW 9.46.0245 as “any wager made in the course of and any information intended to be used for *professional gambling*.” (Emphasis added.). As explained, “professional gambling” requires either gambling or bookmaking. The absence of these foundational elements means that there is no professional gambling, thus there is no gambling information, and thus there is no violation of RCW 9.46.240.

Similarly, RCW 9.46.217 in relevant part criminalizes the making, possessing, or storing of “any gambling record.” “Gambling record” is defined in RCW 9.46.0253 to mean “any record . . . used or intended to be used in connection with *professional gambling*.” (Emphasis

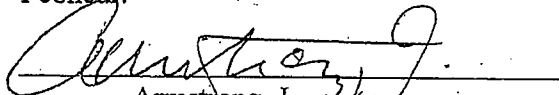
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added.). Again, because there is no gambling or bookmaking, there is in turn no professional gambling, no gambling record, and no violation of RCW 9.46.217.

For the reasons discussed, we reverse the trial court's grant of summary judgment to the State and remand for entry of summary judgment in favor of Betcha.com in compliance with this decision.

  
Bridgewater, P.J.

I concur:

  
Armstrong, J.

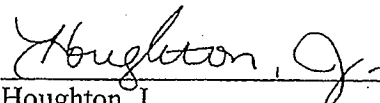
Houghton, J. (dissenting)—I respectfully dissent from my colleagues' decision that allows Betcha.com to operate as it intends. I do so fully knowing and understanding that the rules of statutory construction could provide a basis for the majority's opinion. And although, in my usual judicial course, I follow the majority's cited statutory construction principles, I cannot do so here. Another principle requires us not to read a statute so literally that it would result in absurd consequences. *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007). Unfortunately, absurd consequences will occur here.

In enacting the Washington State Gambling Act, chapter 9.46 RCW, the legislature declared that

[t]he public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control.

RCW 9.46.010.

Certainly the legislature did not intend that Betcha.com, while running its operation on foreign-based servers, could provide an unregulated platform for Internet wagering that undoubtedly will result in unpaid wagers being collected through unlawful means. Most certainly this is not the result the legislature intended when it set forth its strong declaration of public policy against unregulated gambling. Thus, I dissent.

  
Houghton, J.